STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 28, 2000
v	No. 212719 Kent Circuit Court
CARL JERRY MURPHY, JR., Defendant-Appellant.	LC No. 97-007420-FH

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of embezzlement, MCL 750.174; MSA 28.371. He was sentenced to a term of four years on probation, and appeals as of right. We affirm.

On appeal, defendant first argues that trial court abused its discretion when it admitted MRE 404(b), "bad acts," evidence. We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice* (*On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

In assessing the admissibility of bad acts evidence, the trial court must analyze the proposed MRE 404(b) evidence to determine: (1) if the evidence is relevant to an issue other than propensity, (2) if the evidence is relevant, and then the court must (3) balance the evidence under MRE 403 to determine if the danger of unfair prejudice substantially outweighs the probative value. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994).

First, the evidence was relevant to an issue other than propensity. In her opening statement, defense counsel asserted that defendant complained that "too many people were in the office when he was counting the money. That the safe was left open on occasion, and in fact, money, on occasion, was put in a file cabinet instead of a safe." Defense counsel also stated that "this loss could be due to

misfortune, it could be to accident, but that doesn't make it a criminal case, it doesn't make it a crime. We've all lost things in the past." Thus, the evidence that defendant had engaged in improper billing practices for previous partners and employers was offered for a proper purpose – to address defendant's assertion that the lost money may have been an accident.

Second, the evidence was relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Crawford, supra*, 458 Mich 387. Thus, evidence is relevant if two components are present: materiality and probative value. *Id*. at 388.

Materiality looks to the relationship between the "propositions for which the evidence is offered and the issues in the case." *Id*. at 388-389. In Michigan, it is well established that all elements of a criminal offense are in issue and thus material when a defendant enters a plea of not guilty. *Id*. (citing *People v Mills*, 450 Mich 61, 69; 537 NW2d 909, mod 450 Mich 1212; 539 NW2d 504 (1995)). In the case at bar, defendant placed all of the elements of the offense in issue by asserting that defendant's theory of the case was that defendant did not commit the crime. The scope of defendant's examination and arguments focused on the paperwork and money being misplaced or lost because of sloppy administrative procedures and/or stolen by another because of a lack of security. Plaintiff proposed the MRE 404(b) evidence to rebut these arguments and prove the elements of the offense. Therefore, the evidence satisfied the material prong.

To determine whether evidence has probative value, this Court asks "whether the proffered evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Crawford, supra*, 458 Mich 390. In *Crawford*, this Court accepted the "doctrine of chances" to determine if MRE 404(b) evidence satisfied the probative value prong of relevance. *Id*. at 392-393. "Where material to the issue of mens rea, . . . [the "doctrine of chances"] rests on the premise that 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.'" *Id*. at 393 (quoting Imwinkelried, Uncharged Misconduct Evidence, §3:11, p 45). To invoke the "doctrine of chances," "the prosecutor must 'make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person.'" *Id*. at 394 (quoting Imwinkelried, *The use of evidence of an accused's uncharged misconduct to prove mens rea: The doctrines which threaten to engulf the character evidence prohibition*, 51 Ohio St L J 575, 602 (1990)). The MRE 404(b) evidence had probative value pursuant to the "doctrine of chances." At the motion in limine, plaintiff established how each of the uncharged incidents was similar to the charged offense and that defendant was involved in such incidents more frequently than the typical person, in essence, the doctoring of paperwork in order to obtain money for defendant's own benefit occurring three separate times in the past. Therefore, the MRE 404(b) evidence has probative value.

Third, the danger of unfair prejudice does not substantially outweigh the probative value of the MRE 404(b) evidence. Unfair prejudice encompasses two concepts: 1) "'the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or

preemptive weight by the jury'" and 2) "'the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it.'" *Mills, supra*, 450 Mich 75-76 (quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983)). The relevancy of the MRE 404(b) evidence was not substantially outweighed by the danger of unfair prejudice. First, the MRE 404(b) evidence could not have been given undue or preemptive weight by the jury because the trial court gave the jury a comprehensive instruction regarding the permissible and impermissible uses of the evidence. Second, it was not inequitable to allow plaintiff to use the MRE 404(b) evidence because the evidence was used to rebut defendant's theory that the paperwork and money could have been misplaced or lost because of sloppy administrative procedures. Therefore, the danger of unfair prejudice does not substantially outweigh the probative value of the MRE 404(b) evidence.

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct during closing arguments. Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

On appeal, defendant takes issue with the following statement: "It's happened before, he's done it before, it's business as usual," and argues that this statement was made to prove the crime charged or that defendant is a bad person. Although defendant is correct in arguing that evidence of other wrongs cannot be used to prove the crime charged or that the defendant is a bad person, in essence, for propensity purposes, the statement, when examined in context, indicates that plaintiff did not make this statement to prove the crime charged. MRE 404(b). Instead, the record indicates that plaintiff simply made the statement to summarize defendant's interaction with a co-worker. Furthermore, even if the statement could be misinterpreted as propensity evidence, the trial court gave an immediate curative instruction. "It is well settled that juror are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, any possible misconduct on the part of plaintiff would have been immediately cured with this instruction.

Last, defendant argues that he was deprived of his right to the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), on remand 839 F2d 1401 (CA 10, 1988), after remand 900 F2d 1511 (CA 10, 1990); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, on remand 737 F2d 894 (CA 11, 1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Furthermore, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Rice, supra*, 235 Mich App 445. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy unless failure to call a witness deprives defendant of a substantial defense. *People v Mitchell*,

454 Mich 145, 163; 560 NW2d 600 (1997). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999).

In the case at bar, defense counsel's failure to call defendant as a witness is a classic issue of trial strategy. Furthermore, the absence of defendant's testimony did not deprive defendant of a substantial defense. Furthermore, defendant was provided with a defense. Defendant's counsel argued against the admission of the MRE 404(b) evidence, cross-examined plaintiff's witnesses, and argued that the evidence was insufficient to convict defendant. Therefore, on the apparent, already existing record, it appears that defendant's counsel did provide defendant with a defense and counsel's performance, based on an objectively reasonable standard, was not below the prevailing professional norms.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald